No. 83-478

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM W. SHAFFER, PETITIONER

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner contends that his indictment should have been dismissed because the prosecutor did not more fully explore the motive of a co-conspirator for testifying before the grand jury.

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of conspiracy to import cocaine, in violation of 21 U.S.C. 963; one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846; one count of importing cocaine, in violation of 21 U.S.C. 952 and 960; one count of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and on two counts of income tax evasion, in violation of 26 U.S.C. 7201. Petitioner was sentenced to concurrent three year terms of imprisonment on the four narcotics charges as well as a three year special parole term on the two substantive narcotics counts. He was also sentenced to five years' probation

on the two tax evasion counts. The court of appeals affirmed in an unpublished opinion (Pet. App. 1-4).

1. Petitioner's convictions arose from his participation with several others in various cocaine importation and distribution ventures. Petitioner's role in the initial partnership was to supply the capital for the cocaine purchases. He furnished funds to Robert Durand, who was to arrange for transportation of the cocaine. Co-defendant Barron Bingen[1] was to provide the name of the source for the cocaine and help petitioner in its distribution. The three were to split the profits equally (Tr. 417-423). Petitioner's successful ventures included the importation of 18 kilograms of cocaine in August 1975 (Tr. 426-434, 438-439); the importation of 18 to 20 kilograms of cocaine in February 1976 (Tr. 444-450, 456-457), and, the importation of approximately 125 kilograms of cocaine paste in June 1976 (Tr. 962-964).

The government's chief witness before the grand jury and at trial was Robert Durand. Durand appeared twice before the grand jury. He testified about the cocaine dealings and his own prior criminal conduct. He further testified that he was prompted to cooperate with the government out of a sense of moral obligation (Tr. 186). Prior to trial, the government disclosed to petitioner a memorandum that Durand's attorney had prepared before Durand approached the government seeking a grant of immunity. The memorandum recounted the attorney's recollection of Durand's motivation for cooperating, including blackmail threats and fear of criminal prosecution. At trial, Durand's motivation for cooperating was fully explored during cross-examination. He denied that he was motivated by any reason other than a desire to find the murderers of three of his friends and a sense of moral obligation to society (Tr.

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[1]Bingen pleaded guilty prior to trial. Co-defendant Joseph Hylan was tried jointly with petitioner; the jury acquitted Hylan (Tr. 1569).

544-571, 586-591, 594-595, 612-618, 683-693, 719-720, 733-738). In addition, challenges to Durand's credibility, particularly his motivation in testifying, were the cornerstones of the summations to the jury on behalf of both defendants (Tr. 1327-1344, 1346, 1391-1393, 1396-1431).

2. Petitioner claims (Pet. 4-8) that the indictment should have been dismissed because the prosecutor failed to inform the grand jury more fully about Durand's motives for cooperating with the government. This claim lacks merit.

Generally, "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (footnote omitted). In a limited exception to this rule the Ninth Circuit has held that, in the exercise of its supervisory power, it may be appropriate to dismiss an indictment due to prosecutorial misconduct before a grand jury when, as a result, "the manner in which the prosecution obtained the indictment represent[s] a serious threat to the integrity of the judicial process." *United States* v. *Samango*, 607 F.2d 877, 884-885 (9th Cir. 1979); see, *e.g.*, *United States* v. *Everett*, 692 F.2d 596, 601 (9th Cir. 1982); *United States* v. *Owen*, 580 F.2d 365, 367 (9th Cir. 1978). The sanction of dismissal is reserved, however, for very limited and extreme circumstances. *United States* v. *Thibadeau*, 671 F.2d 75, 77 (2d Cir. 1982).[2] Before

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[2]The post-conviction dismissal of an indictment on grounds of prosecutorial misconduct is an extreme remedy that would not ordinarily serve the ends of justice in particular cases. Where a petit jury has already found the defendant guilty beyond a reasonable doubt, there is little reason to vacate that determination because a prosecutor misstepped in obtaining a similar determination from a grand jury on the basis of the lesser standard of probable cause. The only rationale for dismissing an indictment in such circumstances is to deter future prosecutorial misbehavior. *United States* v. *Thibadeau*, 671 F.2d at 77-78.

that sanction is warranted, prosecutorial misconduct must rise to the level of deception of the grand jury in some significant way, such as the knowing presentation of perjured testimony. *United States* v. *Thompson*, 576 F.2d 784, 786 (9th Cir. 1978); *United States* v. *Kennedy*, 564 F.2d 1329, 1335-1338 (9th Cir. 1977), cert. denied, 435 U.S. 944 (1978). There was no such deception of the grand jury in this case.

Durand's substantive testimony regarding petitioner's cocaine dealings was corroborated by documents and interview reports presented to the grand jury (Tr. 187). Furthermore, the allegedly withheld information did not significantly erode Durand's credibility. It showed only that, in addition to being motivated by moral principles, Durand was also motivated by enlightened self-interest—the avoidance of prosecution through a grant of immunity. Nor is there any basis for petitioner's suggestion (Pet. 6) that Durand's testimony was tantamount to perjury. The question of motivation was one uniquely within Durand's personal knowledge. Durand's attorney, quite appropriately, concerned himself with practical concerns, such as avoiding prosecution. But this does not render perjurious Durand's testimony that his motivation, as an individual and not just as a putative defendant, was based on a personal sense of moral obligation.[3]

Petitioner has made no allegation of the type of flagrant misbehavior that might warrant dismissal of the indictment as a means of deterring future misconduct. See *United States* v. *Sears, Roebuck & Co.*, 719 F.2d 1386 (9th Cir. 1983) (reversing district court's dismissal of indictment on ground that prosecutor's conduct before the grand jury was inflammatory and prejudicial).

[3]Accordingly, this case differs from *United States* v. *Basurto*, 497 F.2d 781 (9th Cir. 1974), on which petitioner relies (Pet. 6-7). In *Basurto*, the key witness admitted that he committed perjury on material issues before the grand jury. Here, there was no perjury at all, much

At most, the grand jury was deprived of a prior inconsistent statement by Durand concerning his motive for cooperating with the government. But such an alleged deficiency in the presentation of evidence to a grand jury does not warrant dismissal of an indictment. *United States* v. *Seifert*, 648 F.2d 557, 564 (9th Cir. 1980). Moreover, the inconsistency, if any, did not relate in any way to Durand's testimony regarding petitioner's cocaine dealings. Rather, it related solely to the issue of Durand's credibility. It is well settled that an indictment may not be dismissed merely for failure to present evidence impeaching the credibility of a grand jury witness.[4] *United States* v. *Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir. 1983), cert. denied, No. 82-6149 (May 16, 1983); *United States* v. *Tham*, 665 F.2d 855, 862 (9th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *United States* v. *Trass*, 644 F.2d 791, 796-797 (9th Cir. 1981); *United States* v. *Thompson*, 576 F.2d 784 (9th Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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less on material facts relating to petitioner's guilt. Even if there were some inconsistency between this case and *Basurto*, it would be a matter for the Ninth Circuit, not this Court, to resolve.

[4]There is no allegation of additional serious misconduct before the grand jury which, combined with failure to make a fair presentation of the credibility of the prosecution witnesses, might warrant dismissal of an indictment. *United States* v. *Samango*, 607 F.2d 877 (9th Cir. 1979).